No. 93-2041

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

DAVID CARNEY, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in this action by petitioner under the Freedom of Information Act, 5 U.S.C. 552, the district court abused its discretion by denying petitioner's motion to conduct discovery under Fed. R. Civ. P. 56(f) before ruling on the government's motion for summary judgment on its exemption claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 19 F.3d 807. The opinion of the district court (Pet. App. 17a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. The petition for a writ of certiorari was filed on June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner requested documents from several components of the Department of Justice under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Depart-

ment withheld certain documents responsive to petitioner's requests on the ground that they fell within two FOIA exemptions. In this action by petitioner to compel disclosure of the withheld documents, the district court granted summary judgment for the Department after denying petitioner's motion to conduct discovery under Fed. R. Civ. P. 56(f). Pet. App. 17a-31a. The court of appeals affirmed. *Id.* at 1a-16a.

1. In October 1991, petitioner, who is a lawyer and graduate student in political science, submitted numerous, extensive FOIA requests to several components of the Department of Justice. The requests sought documents relating to Supreme Court appointments, lower federal court appointments, and Department personnel. Petitioner later submitted follow-up requests seeking documents relating to additional Department personnel, the Department's FOIA processing procedures, and the processing of his own requests. Three Department components—the Office of Legal Counsel (OLC), the Office of Information and Privacy (OIP), and the Civil Rights Division (Civil Rights)—were responsible for processing petitioner's requests. Pet. App. 2a-3a, 19a; see C.A. App. 19.

2. In May 1992, petitioner filed this action against the Department of Justice in the United States District Court for the Western District of New York, seeking to compel disclosure of the requested documents. The district court stayed the proceedings until December 15, 1992, to allow OLC, OIP, and Civil Rights to complete the processing of petitioner's requests. Each component later made a large quantity of responsive material available to petitioner by furnishing him with copies of many documents and permitting him to examine and copy other documents at the Department's offices. The components also withheld certain responsive documents

in whole or in part, however, under Exemption 5[1] and Exemption 6[2] of the FOIA. Pet. App. 5a-6a, 23a-24a.

The Department moved for summary judgment on its exemption claims. In support of the motion, the Department submitted three lengthy declarations from the officials in OLC, OIP, and Civil Rights who had supervised the processing of petitioner's requests. C.A. App. 17-38, 61-82, 162-169 (reproducing declarations). Each declaration described how the component had searched for responsive documents, what documents had been withheld, and why the withheld documents were exempt from disclosure under the FOIA.

Instead of opposing the government's summary judgment motion on the merits, petitioner filed procedural motions seeking to conduct discovery under Fed. R. Civ. P. 56(f), to compel responses to discovery requests that he had submitted with his complaint, and to strike the three declarations. In support of those motions, petitioner alleged in an affidavit that he believed that the Department had not identified or accurately described all responsive documents. Petitioner claimed that his belief was based on numerous confidential interviews and his own research. He did not, however, identify any of those interviewees or the research on which he relied. C.A. App. 197-212.

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[1] FOIA Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5).

[2] FOIA Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

The district court denied petitioner's procedural motions.[3] Pet. App. 17a-31a. In particular, the court found "absolutely no basis for determining that [petitioner's] [Rule] 56(f) motion * * * is grounded on anything other than speculation." *Id.* at 28a. The court held that such speculation, "absent any evidence to contradict [the Department's] proof, or to establish [the Department's] bad faith, is insufficient to sustain [petitioner's] request pursuant to Rule 56(f)." *Ibid.* (citation omitted) The court further held that the withheld documents fell within the claimed exemptions, and it accordingly granted summary judgment for the Department. *Id.* at 24a-26a.[4]

3. In the court of appeals, as in the district court, petitioner did not challenge the government's exemption claims on the merits. Instead, as relevant here, he challenged only the district court's decision to rule on the government's motion for summary judgment without ordering discovery under Rule 56(f). The court of appeals affirmed. Pet. App. 1a-16a. It observed that petitioner had alleged "that the [Department] has concealed the existence of records and mischaracterized other

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[3] Petitioner based his motion to compel responses to his initial discovery requests on the same grounds that he asserted in support of his motion for discovery under Rule 56(f). Accordingly, neither the district court nor the court of appeals analyzed those two motions separately. See Pet. App. 8a-10a, 27a-29a. Both courts below denied petitioner's motion to strike the agency declarations. *Id.* at 10a-11a, 26a-27a. Of petitioner's three procedural motions, only his motion under Rule 56(f) is at issue in this Court. See Pet. 7.

[4] The district court also held that petitioner was not entitled to a waiver of FOIA search fees. Pet. App. 29a-30a. The court of appeals reversed that holding in part, *id.* at 11a-16a, and it is no longer at issue.

records in order to avoid disclosing them to him." *Id.* at 9a-10a. It found itself, however, "faced with a complete lack of tangible proof of [that] allegation[]." *Ibid.* The court explained that "[petitioner] does not identify, by name, title or otherwise, any of the individuals he interviewed, nor does he point to any of the published sources on which he supposedly relies." *Ibid.* The court "sympathized" with petitioner's asserted wish not to reveal confidential sources, but it determined that "something more than [petitioner's] bare allegations [was] needed." *Ibid.* The court concluded that "[w]ithout factual support, [petitioner's] allegations are grounded in mere speculation, and the district court therefore did not abuse its discretion in denying him discovery." *Ibid.*

ARGUMENT

The court of appeals correctly applied well-settled legal principles, equally applicable to FOIA and other civil litigation, in upholding the denial of petitioner's Rule 56(f) motion and the award of summary judgment for the government. As petitioner concedes (Pet. 9), the court of appeals' decision does not conflict with any decision of this Court or that of any other court of appeals. Further review therefore is not warranted.

1. The court of appeals correctly stated the standards governing the government's motion for summary judgment. The court stated that "[i]n order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption of the FOIA." Pet. App. 8a (citing 5 U.S.C. 552(a)(4)(B) and *EPA* v. *Mink*, 410 U.S. 73, 79 (1973)). The court further stated that the agency may meet that burden by submitting affidavits or declarations "indicating that [it] has conducted a

thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption." Pet. App. 8a. Because the agency's affidavits "are 'accorded a presumption of good faith,'" the court said, discovery regarding the agency's search and the claimed exemptions "generally is unnecessary if the agency's submissions are adequate on their face." *Ibid.* (quoting *Safecard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). The court noted, however, that the plaintiff may rebut that presumption by making "a showing of bad faith on the part of the agency sufficient to impugn" the integrity of the agency's submissions, or by providing "some tangible evidence that an exemption claimed by the agency should not apply or [that] summary judgment is otherwise inappropriate." Pet. App. 8a-9a.

Petitioner does not and cannot challenge the court of appeals' statement of the governing principles. Instead, he argues (Pet. 10-11) that, in applying those principles to the facts of this case, the court of appeals in effect adopted a "rule" of deference to agency affidavits that is "questionable" in light of FOIA's objectives of openness in government and the "imbalance" of information in FOIA cases. Petitioner mischaracterizes the court of appeals' decision.

The court of appeals did not adopt a "rule" barring discovery in FOIA cases. Rather, it articulated a standard—that discovery "*generally*" is unnecessary in FOIA cases "*if*" the agency's declarations are adequate on their face, Pet. App. 8a (emphasis added)—that calls for case-by-case examination of the agency's submission. The court then correctly determined that the declarations submitted by the Department in this case were adequate on their face, because they were "reasonably detailed," they "reveal[ed] that each of the [Department] subdivisions undertook a diligent search

for documents responsive to [petitioner's] requests," and they "describe[d] the documents or classes of documents withheld and explain[ed] why they fall within an applicable exemption." *Id.* at 9a. In light of that determination, the court of appeals properly held that the Department had adequately supported its motion for summary judgment.

The court of appeals did not hold that, in order to avoid summary judgment, a FOIA plaintiff must provide "'tangible proof' of governmental misconduct," as petitioner asserts (Pet. 13). Instead, the court said that, "once the agency has satisfied its burden" on a summary judgment motion, the party opposing the motion must "provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate." Pet. App. 8a-9a. Thus, the court of appeals did not purport to limit the means by which a FOIA plaintiff can avoid summary judgment. It simply held that, in order to defeat a properly supported motion for summary judgment, a FOIA plaintiff must make the same showing as any other non-moving party. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 884-885 (1990); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986).

Petitioner suggests that a FOIA plaintiff should not have to make the same showing that other civil litigants must make to avoid summary judgment, because of the "imbalance" of information in FOIA cases. Pet. 11. Any such "imbalance," however, is addressed by the FOIA itself, which puts the burden on the agency to justify its withholding of responsive documents. 5 U.S.C. 552(a)(4)(B); *EPA* v. *Mink*, 410 U.S. at 79. The court of appeals was cognizant of that burden and correctly held that the government had met it. See Pet. App. 8a.

2. Petitioner challenges the denial of his Rule 56(f) motion on essentially the same ground that he challenges the award of summary judgment for the Department. He contends that the court of appeals "improperly truncate[d]" the application of Rule 56(f) by holding that "an FOIA plaintiff cannot rely on Rule 56(f) in the absence of 'tangible proof' of governmental misconduct." Pet. 8, 13. Petitioner again mischaracterizes the court's holding.

The court of appeals emphasized that, in order to prevail on a Rule 56(f) motion, a FOIA plaintiff need not present evidence that would be admissible at trial. Pet. App. 10a. The court correctly recognized, however, that a Rule 56(f) motion must be supported by "something more than * * * bare allegations." Pet. App. 10a. That is the same standard that courts apply outside of the FOIA context. See, *e.g.*, *Contemporary Mission, Inc.* v. *United States Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981); *Cramer* v. *Devon Group, Inc.*, 774 F. Supp. 176, 180 (S.D.N.Y. 1991); see also *Applegate* v. *Top Assocs., Inc.*, 425 F.2d 92, 96 (2d Cir. 1970). Indeed, it is the same standard that petitioner endorses. Pet. 15 ("The normal Rule 56(f) test * * * mak[es] clear that 'vague assertions' regarding facts to be discovered are insufficient, alone, to warrant discovery.").

Thus, the court of appeals did not hold that a FOIA plaintiff is required in every case to support a Rule 56(f) motion by presenting evidence of governmental wrongdoing. The court cited the lack of such evidence here only because petitioner based his Rule 56(f) motion on his "conten[tion] that the DOJ ha[d] concealed the existence of records and mischaracterized other records in order to avoid disclosing them." Pet. App. 9a-10a. Thus, it was petitioner who raised the issue of agency misconduct as a basis for discovery under Rule 56(f).

The court of appeals correctly determined that there was a "complete lack of tangible proof" of such misconduct, and that petitioner's "bare allegations" were inadequate. Pet. App. 10a.[5]

Nor are the courts of appeals "befuddled" by the role of Rule 56(f) in FOIA litigation, as petitioner asserts (Pet. 13). The single decision that petitioner cites in support of that assertion, *Church of Scientology* v. *IRS*, 991 F.2d 560 (9th Cir. 1993), manifests no division or confusion among the courts of appeals on that score. Instead, the court in *Church of Scientology* simply declined to make a "broad statement" about "the general discretion of a district court to grant or deny a Rule 56(f) motion," opting instead for a careful and fact-specific resolution. *Id.* at 563. Moreover, because the court of appeals in that case held that the FOIA plaintiff before it was entitled to conduct discovery, the decision shows that courts permit discovery in FOIA cases if the plaintiff makes a sufficient factual showing to justify it.

3. Finally, petitioner argues (Pet. 16-20) that the courts below erred in holding that he failed to satisfy the standard for conducting discovery under Rule 56(f). Petitioner concedes (Pet. 19), however, that the district court's ruling on that issue was subject to review only

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[5] The Seventh Circuit, sitting *en banc*, held in a similar context that a district court did not abuse its discretion by refusing to conduct an *in camera* review of requested documents based solely on an assertion of government bad faith. If district courts were required to conduct *in camera* review based solely on such an assertion, the court reasoned, they "would feel obligated" to do so "in nearly every FOIA case, because nearly every FOIA request would be accompanied by the talismanic buzz words 'Government wrongdoing.'" *Silets* v. *Department of Justice*, 945 F.2d 227, 231-232 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 2991 (1992).

for an abuse of discretion.[6] The court of appeals properly held that, under the circumstances of this case, the district court acted within its discretion in denying petitioner's Rule 56(f) motion. Pet. App. 10a. That factbound holding does not merit further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

As both lower courts found, petitioner relied on "mere speculation" in seeking discovery under Rule 56(f). Pet. App. 10a; see *id.* at 28a. For example, he asserted in the affidavit supporting his Rule 56(f) motion that the Department had withheld certain categories of responsive documents. C.A. App. 200-202. However, many documents in those categories were in fact disclosed to him, as the Department's declarations made clear. Compare, *e.g.*, *id.* at 201 (assertion in petitioner's affidavit that Department had withheld material supplied to Senate Judiciary Committee) with *id.* at 31 (declaration describing such material). Although petitioner also purportedly described specific documents that he believed had been withheld, see *id.* at 203-205, he did not show that the Department was in possession of those

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[6] District courts are accorded discretion by the plain terms of Fed. R. Civ. P. 56(f), which provides:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

documents but failed either to make them available to him or to explain why they had not been made available.[7]

Moreover, even if petitioner had shown that there were certain responsive documents in the Department's files that had not been made available to him or described in the agency's declarations, that showing would not have precluded summary judgment. In reviewing an agency's declaration in support of summary judgment, the relevant question "is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *Safecard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); accord, *e.g.*, *In re Wade*, 969 F.2d 241, 249 n.11 (7th Cir. 1992) ("The issue is *not* whether other documents may exist, but rather whether the search for undisclosed documents was adequate."); see also *Oglesby* v. *Department of the Army*, 920 F.2d 57, 67 n.13 (D.C. Cir. 1990) (claim that other responsive documents "*must* exist" is "insufficient to raise a material question of fact with respect to the adequacy of the agency's search"); *Miller* v. *Department of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) ("the search need only be reasonable; it does not have to be exhaustive").

Petitioner asserts that it was a "gross miscarriage of justice" for the courts below to deny him discovery because "the sources of his information [were] * * * unwilling to provide on-the-record confirmation" of the allegations in his Rule 56(f) affidavit. Pet. 17. The

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[7] In this Court, petitioner asserts (Pet. 4 n.3, 17 n.15, 18 n.18) that he supplied evidence of improperly withheld documents by "cit[ing]" several books relating to the Department's role in the process of nomination and confirmation of Supreme Court Justices. None of those books, however, was cited in his Rule 56(f) affidavit or in any other documents in the record before the lower courts.

premise of that assertion is incorrect. The courts below did not require petitioner to disclose the identity of any confidential sources. Indeed, the court of appeals expressed sensitivity to petitioner's wish to honor any assurances of confidentiality he had made. Pet. App. 10a. The court simply required "something more than his bare allegations." *Ibid.*

Petitioner could have supplied more than bare allegations without compromising any confidential sources. For example, he could have asked the district court for leave to submit affidavits from his interviewees under seal or pursuant to a protective order; he could have requested *in camera* review to test the validity of the declarants' statements; he could have sought appointment of a "special master" or a sampling of responsive documents; or he could have submitted FOIA requests, in the first instance, that identified with particularity the documents he allegedly knew to exist. Petitioner did none of those things. He cannot now complain that the district court did not "explore less severe alternatives to a summary judgment dismissal" (Pet. 20) that he (an attorney himself) never suggested.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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